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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	Chapter 9
NEW YORK CITY OFF-TRACK BETTING CORPORATION,	Case No. 09-17121 (MG)
Debtor.	

OBJECTION AND JOINDER OF EMPIRE RESORTS, INC. AND MONTICELLO RACEWAY MANAGEMENT, INC. IN YONKERS RACING CORPORATION'S OBJECTION TO THE MOTION OF DISTRICT COUNCIL 37, LOCAL 2021 FOR APPOINTMENT OF TRUSTEE PURSUANT TO SECTION 926(a) OF THE BANKRUPTCY CODE TO PURSUE CLAIMS TO AVOID AND RECOVER ALLEGED FRAUDULENT TRANSFERS MADE TO THE NEW YORK TRACKS

TO: THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Empire Resorts, Inc. ("Empire") and its wholly-owned subsidiary, Monticello Raceway Management, Inc. ("MRMI"), owner and operator of Monticello Raceway, a harness racing track in Sullivan County, New York, by and through their undersigned counsel, hereby object and join (the "Joinder") in the objection (the "Objection") of Yonkers Racing Corporation [Docket No. 270] to the motion of District Council 37, Local 2021 (the "Union") for an order pursuant to section 926 of the Bankruptcy Code appointing a trustee in the above-captioned chapter 9 bankruptcy case of New York City Off-Track Betting Corporation (the "Debtor") to pursue claims to avoid and recover alleged fraudulent transfers made to the owners of the New York Tracks[1] [Docket No. 247] (the "Trustee Motion"). In support of their objection and Joinder, Empire and MRMI state as follows:

1. On December 3, 2009, the Debtor filed with this Court a voluntary petition for relief commencing this case under chapter 9 of the Bankruptcy Code.

2. The Debtor is a public benefit corporation created by statute, to wit, New York Racing, Pari-Mutuel Wagering and Breeding Law (the "Racing Law") § 518. The Debtor operated an off-track pari-mutuel betting system through OTB parlors, internet wagering and television racing channels in New York City until on or about December 7, 2010. The Debtor took bets on live horse races that took place at New York State tracks, other tracks in this state, tracks in many other states in this country, and tracks in Canada.

3. The Debtor was established, and its operations were governed, by the Racing Law and the comprehensive regulatory scheme set forth therein. As codified in the Racing Law, it is the public policy of the State of New York that the OTB corporations in New York State foster and contribute to the well-being of the horse racing industry in New York State.

4. Monticello Raceway has been conducting live harness racing for over 50 years and conducts over 200 racing programs per year, thereby providing racing opportunities and income for horsemen, including owners, trainers and drivers in New York, which in turn benefit numerous ancillary persons whose products and services support the harness racing and standardbred (harness racing horse) breeding industry in New York State.

[1] The "NY Tracks" means New York Racing Association, Yonkers Racing Corporation, Empire Resorts, Inc., Monticello Raceway Management, Inc., Monticello Raceway, Finger Lakes Racing Association, Inc., Delaware North Companies, Delaware North Companies Gaming & Entertainment, Inc., Vernon Downs and Tioga Downs.

5. Empire and MRMI object to the Trustee Motion on the bases set forth in the Objection, and join in the Objection. Empire and MRMI also object to the Trustee Motion on the basis of what is stated in the declaration of Marvin Newberg, dated January 11, 2011, which is annexed hereto as Exhibit 1.

6. Empire and MRMI reserve their right to amend and supplement this objection and Joinder.

Dated: New York, New York
January 12, 2011

OLSHAN GRUNDMAN FROME
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By: /s/ Herbert Ross

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EXHIBIT 1

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: NEW YORK CITY OFF-TRACK BETTING CORPORATION, Debtor.	Chapter 9 Case No. 09-17121 (MG)

DECLARATION IN OPPOSITION TO MOTION OF DISTRICT COUNCIL 37, LOCAL 2021 FOR APPOINTMENT OF TRUSTEE

MARVIN NEWBERG declares as follows:

1. I am one of the attorneys for Empire Resorts, Inc. and its subsidiary, Monticello Raceway Management, Inc. ("MRMI"), which operates Monticello Raceway, a harness racing track in Sullivan County, New York. I make this declaration in opposition to the motion of District Council 37, Local 2021 for appointment of a Trustee to pursue claims to avoid and recover allegedly fraudulent transfers made by Debtor ("NYC OTB") to operators of New York race tracks, including MRMI. As counsel for MRMI on legal issues relating to horse racing for over ten years, I am fully familiar with the facts and circumstances set forth in this declaration.

2. The premise upon which movant's motion is brought, i.e., that the payment of indirect commissions to New York State race tracks constitutes fraudulent conveyances by NYC OTB, completely ignores the history of the creation of the OTBs, the enactment of the various statutes authorizing the indirect commissions, and the realities of the OTB business and the racing industry in New York. There is no factual support for movant's conclusory allegation that there was neither fair consideration nor reasonably equivalent value for the statutory obligations to the pay indirect commissions to the race tracks.

3. When the New York state legislature created the OTB system for New York in 1973, the enabling statute stated that the OTBs' mission was to provide revenue to the local and state governments in New York as well as to foster the well-being of the racing industry in New York State. When the OTB system was created, all of the six regional OTB corporations, including NYC OTB, were authorized to accept wagers only on New York tracks. The purpose of that restriction was self-evident, i.e., that the OTBs would provide additional wagering outlets for those racing and betting patrons who wished to bet on horse races run in New York but could not go to the track. While the OTBs retained the lion's share of the commissions on those wagers, a statutory percentage was set by the legislature for the OTBs to pay to the tracks which provided the racing product to the OTB parlors on which they took bets and made money. Thus, the OTBs and the racing industry made money on wagers on New York races at the OTBs.

4. The OTBs are and have been retailers. They offer a product, namely, taking bets on horse races. For each dollar bet, an OTB receives approximately twenty-one (21) cents in revenue as approximately seventy-nine (79) cents is paid to the winning bettors. Just like any retailer, the OTBs have to pay for their product. The display of races upon which OTBs patrons bet is the product being offered, and there is a cost for that product. The cost to OTBs for

displaying races run at most tracks in New York State is five (5) cents on every dollar wagered. The OTBs retained the balance of their revenues (approximately sixteen (16) cents on each dollar) from which they were to pay their expenses and make statutory payments to the counties in which they operate and the state.

5. After a few years, the OTBs were not satisfied with just taking bets on New York races, and wanted more product to sell. The OTBs lobbied the state legislature to be allowed to simulcast and take bets on out-of-state thoroughbred races. The most popular and lucrative betting at OTBs was on NYRA's thoroughbred races. NYRA has traditionally been closed or "dark" on Mondays and Tuesdays (except for those relatively few Mondays during the month and a half of racing at Saratoga or a certain, few Mondays on which federal holidays are celebrated). Thus, on those Mondays and Tuesdays when the OTBs were still authorized only to show races on New York tracks, Monticello Raceway and other state harness tracks reaped the benefit of substantial additional handle and corresponding direct commissions being earned those days through the OTBs because the patrons at the OTBs on the "dark days" were betting only on New York harness tracks (and, during part of the year, on races at the Finger Lakes thoroughbred track).

6. After intense lobbying and exercise of political clout by the OTBs, legislation was enacted by the state legislature authorizing all of the OTBs in the state to simulcast out-of-state thoroughbred races. To compensate the harness tracks fairly for the tremendous loss of revenue and commissions by reason of out-of-state thoroughbred tracks being shown by OTBs on days when NYRA was dark (i.e., closed), the enabling legislation to allow OTBs to simulcast out-of-state thoroughbred races included statutory formulas giving a portion of the commissions earned by OTB in taking bets on the out-of-state races on those dark days to the harness race tracks in

New York. Those commissions became known in the harness racing industry as "dark day commissions". The dark day statute has remained in force and effect with slight modifications for over 30 years. Besides a statutory enactment being an expression of public policy and thus implicitly not a fraudulent conveyance, there was indeed fair consideration to the OTBs for these dark day payments. As a result of the authorization to show out-of-state thoroughbred races, the OTBs' handle shot upwards.

7. As further evidence of the fair consideration for dark day payments, the dark day law requires that, in order for a harness track to receive dark day commissions from the OTBs, that harness track cannot display in its own simulcast parlor at the track any out-of-state thoroughbred races on those dark days. Thus, the statute provided that the tracks could not compete on those days with the OTBs for the out-of-state thoroughbred simulcast betting dollars. This concession by the state harness tracks constitutes further fair consideration and equivalent value to the OTBs for the dark day indirect commissions paid by the OTBs to those tracks throughout the years.

8. Another type of indirect commission that NYC OTB was obliged by statute to pay to the harness tracks in its region were the "maintenance of effort" ("MOE") payments that the New York state legislature introduced through legislation when authorizing the OTBs to simulcast and accept in the evening bets on out-of-state thoroughbred races. NYC OTB has not made any MOE payments incurred for the years 2005 through 2009 or for 2010 to MRMI.

9. The other component of indirect commissions is what is known in the industry as "out of state or out of region harness commissions". In the 1980's, the OTBs, again looking for new product to make more money, lobbied for and received statutory authorization to simulcast out-of-state harness races (and harness races conducted in state but out of the OTB's region) to

be offered for betting in the OTBs' parlors and over their TV and internet outlets. This authorization was in direct competition with, and an injury to the well-being of, the harness racing industry in New York State because now OTB patrons who wished to bet on harness races had the option to bet on out-of-state races from all over the country and Canada as opposed to just New York State tracks. Despite this, the OTBs were authorized by the state to add out-of-state and out-of-region harness races to OTBs' betting menu.[1]

10. The New York state legislature saw fit to compensate the harness racing industry reasonably for the further substantial loss of revenue due to this expansion of the OTBs' offerings in harness races by providing a statutory formula whereby some small percentage of the commissions earned by the OTBs for displaying and taking bets on out-of-state and out-of-region harness races were to be paid to the regional harness tracks. The legislature also mandated that a portion of those commissions be paid by the tracks for horsemen's purses to support the racing industry in New York State.

11. As a result of the statutory authorization for taking bets on out-of-state harness races at New York State OTB shops, the New York harness tracks suffered an inevitable loss of on track wagering handle as well as off track wagering handle on New York State harness races. The OTB patron now on a particular day could choose to bet on perhaps six or eight out-of-state harness tracks in addition one or two in-state harness tracks. As the wagering retailer, OTB was now offering, for example, eight harness products for their patrons to purchase through bets as opposed to one or two harness products. The consideration which the state legislature afforded to the New York harness racing industry in the form of commissions on bets taken by the OTBs

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[1] The offering of out-of-region New York harness races similarly constituted a harm to the harness tracks in the region of the OTB taking the bets on the out-of-region races. The offering of the out-of-region races reduced the betting dollars available fo betting on the in -region harness tracks. In any event, the dollar amount of out of region amount for betting dollars availabel fo the in-region races. In any event, the amount of handle on out-of-region harness races at OTBs has been less far less than the amount of handle on out-of state harness radces at the OTBs.

on out-of-state harness races can only be considered as fair consideration and reasonably equivalent in value for the expanded product menu resulting in more revenue which the OTBs sought and were afforded by the legislature.

12. It is frivolous for movant to allege that there is no fair consideration for the payment of indirect commissions by NYC OTB to the New York state racing industry. To claim that the payments are a fraudulent conveyance when they are mandated by statutes which have been in existence for decades and which are part of the comprehensive Racing, Pari-Mutuel and Breeding Law of the State of New York is completely without merit. As history shows, absent payment of the indirect commissions, the OTBs would not have had the statutory ability to take bets and earn their commissions on out-of-state thoroughbred or out-of-state harness races. Movants conveniently do not provide the Court with figures showing how much of the OTBs' handle was due to taking bets on out-of-state races. In 2008, the betting on out-of-state races represented 64% of all handle of the OTBs.

13. Besides the fallacious grounds for movant's motion, there are numerous substantive and procedural infirmities with its request. The New York statutory authorizations for indirect commissions include requirements that the New York harness tracks pay a portion, usually 50%, of all indirect commissions received from the OTBs to the horsemen's purse account at the respective tracks. This statutory requirement is further embodied in the various horsemen's contracts with management throughout the tracks in the state. Thus, the New York harness tracks have received for inclusion in their own revenue only about 50% of the indirect commissions that the OTBs have remitted to the tracks. The tracks paid the other 50% into the horsemen's purse account, and those payments into that account over the years and up to the present have been paid out to all the owners, trainers and drivers who have won purse money at

the races conducted at the tracks. As at Monticello Raceway and most harness tracks, the monies in the horsemen's purse account are escrowed, and the track management acts only as escrow agent in holding and then paying it out in purses. In addition to paying purses to the owners of the horses who finished in the money at the track, the track must pay to the trainer and driver of each of those horses a percentage of the purse that is allocated to the horse that they trained and drove.

14. As movant seeks to recover the allegedly fraudulent conveyances of indirect commissions, it is illogical that movant has not identified as potential defendants each and every owner, driver and trainer who has received a purse check from the various New York tracks over the period of years set forth in the motion. The movant should have notified and served each and every one of the thousands of owners, drivers and trainers who received purse checks which included indirect commissions so that they are heard with regard to this application.

15. It is also revealing that the movant has only named as respondents in this motion operators of race tracks in New York State that were within NYC OTB's region. In its motion papers, Movant claims that the "horse breeding funds" have been paid millions of dollars over the years by NYC OTB in indirect commissions but movant has not named any of the breeding funds as respondents in the instant motion. The payments to the breeders, just as the payments to the in-state tracks, were statutorily authorized. Under movant's misguided theory, the indirect commissions paid to the breeders would have to be considered as fraudulent conveyances, even more so than the payments to the in-state tracks. The various breeder funds did not provide any product to NYC OTB upon which it took bets and made money. The breeders funds do not operate race tracks and conduct races or take bets, and thus they cannot show, as all of the in-state tracks can, that they suffered loss of on-track and off-track betting revenue from the

statutory authorization to the OTBs to display and take bets on out-of-state thoroughbred and out-of-state harness races.

16. In summary, the indirect commissions that NYC OTB paid were nothing more than a component of the cost of its obtaining ever expanding products upon which NYC OTB greatly increased its sales and revenue. Coupling that fact with the facts that the state legislature authorized indirect commissions as a matter of public policy and were the consideration to be paid to the racing industry in New York for the loss of revenue to New York State tracks through the expansion of the OTBs' betting products to include out-of-state races, there can be no basis for any theory that payments of indirect commissions were fraudulent conveyances. There being no underlying cause of action, there is no necessity for the appointment of a Trustee to pursue non-meritorious claims.

WHEREFORE, it is prayed that the motion be denied in its entirety.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 11, 2011.

M. Newberg

MARVIN NEWBERG